STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	)	
-vs-	)	
Illinois Bell Telephone Company	)	
	)	**03-0553**
Complaint concerning imposition of unreasonable and anti-competitive termination charges by Illinois Bell Company.	)	

RESPONSE OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION TO THE JOINT COMMENTS AND JOINT VERIFIED STATEMENTS IN SUPPORT OF THE (REVISED) DRAFT AMENDATORY ORDER

Pursuant to a Notice of Administrative Law Judge's Ruling, dated December 22, 2004, TDS Metrocom, LLC ("TDS") and Illinois Bell Telephone Company ("SBC") (TDS and SBC collectively, the "Joint Movants") filed both Joint Comments ("Joint Comments") and a Joint Verified Statement ("Joint VS" and collectively, "Joint Comments and VS"), on December 28, 2004, in support of their request that the Commission adopt and enter the (Revised) Draft Amendatory Order that TDS and SBC have filed in this proceeding. The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, respectfully submits this Response, and incorporates by reference its prior response[1], in the above-captioned matter to again bring to the Commission's attention certain concerns it has regarding the Joint Motion. The Staff states as follows:

[1] Response of the Staff of the Illinois Commerce Commission To The Joint Motion To ReOpen The Record And Issue An Amendatory Order (filed November 17, 2004).

1. The Joint Movants request that the Commission amend its Final Order in this proceeding in order to vacate the Commission's determination found in Findings and Ordering Paragraph number 9 based upon a post-Final Order settlement between the parties. See generally, Joint Comments and VS. The Joint Movants' request to eliminate a Commission Findings and Orderings Paragraph based upon a post-Final Order settlement, however continues to raise concerns in the Staff's view.

2. Specifically, the Joint Movants continue to seek to have the Commission delete Findings and Ordering Paragraph number 9.[2] As the Staff noted in its Response To The Joint Motion To Re-Open The Record (filed November 17, 2004) ("Staff Response to Joint Motion to Re-Open The Record"), it had certain concerns whether a Post-Final Order settlement met the requirements of Section 200.900 and Section 10-113 of the PUA. 83 Ill. Admin. Code § 200.000; 220 ILCS 5/10-113. Since the Commission did, in fact, re-open the record in this proceeding on December 15, 2004, the legal requirements the Commission currently must address in making a determination of whether it should amend its Final Order in this proceeding fall under Section 10-113 of the PUA.[3] Section 10-113 of the PUA governs amendment of a Commission order and therefore remains relevant to the issues in this reopening. Section 10-113 states, in pertinent part, the following:

> Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it.
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> * * *
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> If, after such rehearing and consideration of all the facts, including those arising since the making of the rule, regulation, order or decision, the

[2] *See e.g.*, Joint Comments and VS, and (Revised) Draft Amendatory Order.

[3] Section 200.900 of the Commission's rules address only the re-opening of the record (which the Commission has already done) and consequently its requirements are no longer relevant.

> Commission shall be of the opinion that the original rule, regulation, order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may rescind, alter or amend the same.
>
> 220 ILCS 5/10-113.

Consequently, under Section 10-113 of the PUA, the Commission has the discretion to change a Final Order if it determines that any part of such order is "unjust or unwarranted," or "should be changed." Section 10-113 however must be construed in light of relevant case law that governs the Commission's actions in amending a previous order. See *Union Elec. Co. v. Ill. Commerce Comm'n*, 39 Ill. 2d 386, 235 N.E.2d 604 (1968); *Chicago Housing Authority v. Ill. Commerce Comm'n*, 20 Ill. 2d 37, 43-44, 169 N.E.2d 268, 273 (1960) ("Where the order rescinds a prior order, we believe that it is clear enough that the old findings were erroneous, that circumstances have changed in the intervening period, or that an error of law was made."). The Commission, consequently, must find that a settlement in this case is a change of circumstances. However, as Staff argued in its prior Response, "[a]n agreement to pay expeditiously those attorneys' fees awarded in the order rather than to pay them after appeals are exhausted is not a material change in the facts that were relied upon in the order." Staff's Response To Joint Motion To Re-Open The Record, at 6.

3. In the Joint VS, the Joint Movants, in support of their position that the Final Order should be amended, state that: (1) SBC's appeal is solely limited to the award of attorney's fees and costs (Joint VS at 1); (2) TDS "voluntarily and without coercion initiated and then entered into" the proposed settlement "based on arms' length negotiations" (*id*., at 2); and (3) TDS entered into the proposed settlement "in order to obtain immediate payment of the full amount of attorney's fees without incurring the

costs of defending the appeal, which TDS estimates "would almost certainly approximate or exceed the amount of attorney's fees and costs that TDS [] had claimed." *Id*., at 3. The Staff has no reason to dispute these statements of the Joint Movants.

4. The Joint Movants also note, both in their Joint VS and Joint Comments that the "Commission expressly directed the parties to negotiate the attorney's fees issue and retained jurisdiction to resolve any dispute or other issue" (Joint Comments at 2), and that the "principal basis for the issuance of an Amendatory Order is the Commission's retained jurisdiction over the attorney's fees issue." *Id*., at 3. In fact, the last sentence of Findings and Ordering Paragraph number 9[4] would appear to support the retention of jurisdiction to resolve disputes regarding attorney's fees that presumably include disputes regarding the timing of payments.

5. In their Comments, the Joint Movants also noted, among other things, that in their (Revised) Draft Amendatory Order the Joint Movants retained language that would "send a strong enough 'signal' to the industry that the Commission will not tolerate anticompetitive termination liabilities policies." *Id*. While the Staff agrees with the Joint Movants that the (Revised) Draft Amendatory Order contains language that puts carriers on notice that the Commission considers termination liability penalties of the magnitude found in the ASCENT proceeding to be anti-competitive, questions still remain as to whether the Order, as revised, sends a "strong enough" signal to the industry. As Staff noted in its previous Response to the Joint Movants, the determination of a Section 13-514 Complaint could affect parties beyond TDS and SBC

[4] The last sentence of Findings and Ordering Paragraph number provides: "The Commission shall retain jurisdiction over this issue for the purpose of resolving disputes concerning said fees and costs;".

because Section 13-514 protects the competitive telecommunications market place in Illinois and delegates to the Commission the role of defining the parameters of anti-competitive behavior, which in turn affects all carriers in the competitive market place. See Staff's Response to Joint Motion To Re-Open The Record, at 6. Staff pointed out that "Section 13-516, moreover, provides for, in the Commission's discretion, increased fines for a carrier found to have violated Section 13-514 more than once." *Id*. Thus, a "carrier found to have repeatedly violated Section 13-514, and consequently facing potentially stiff penalties for any future violations, would presumably be less inclined to engage in anticompetitive behavior, which, in turn would protect the competitive marketplace and those carriers that sought to compete in that market." *Id*.

6. The Joint Movants also note that their proposed (Revised) Draft Amendatory Order would not waste the work efforts put into this proceeding by any of the parties. Joint Comments at 4. For instance, the Joint Movants point out that "Staff sought a rulemaking proceeding to address the termination liability policies of the rest of the industry in Illinois." *Id*. This is true as far as it goes but as the Joint Movants have acknowledged (Joint Motion at 6) Staff also provided the Commission with testimony regarding the excessive termination liability policies that SBC had previously employed prior to the TDS Complaint. See Staff Ex. 1.0 (Ominiyi), at 9-10. Staff does agree with the Joint Movants, however, that the Commission "will have another opportunity in the rulemaking proceeding" to address termination liability provisions on an industry-wide basis and "to ensure that all carriers' practices are pro-competitive." Joint Comments at 5.

7. Finally, the Joint Movants argue that the adoption of their proposed (Revised) Amendatory Order by the Commission would be consistent with the public interest. In support of this position, the Joint Movants state that the (Revised) Amendatory Order is "in accordance with the public policy objectives of allowing and encouraging parties to arrive at negotiated resolution of disputes, avoiding additional litigation, and conserving the resources of the Commission and of the parties that would otherwise be expended in further litigation (i.e., in an appeal of the Order)." Joint Comments at 5. Staff agrees with the Joint Movants that there are public policy objectives of judicial economy in allowing and encouraging parties to arrive at negotiated resolution of disputes, avoiding additional litigation, and conserving the resources of the Commission and of the parties that would otherwise be expended in further litigation. Staff acknowledged such judicial economy gains in its Response to Joint Motion to Re-Open The Record, at 5. Staff also noted, however, that any such public interest gains in judicial economy should be balanced against any losses the public interest could suffer from the Commission supporting post-order settlements. *Id*. Staff summarized some of the potential public interest losses in judicial economy that could derive from supporting post-order settlements as follows:

> Permitting parties to settle after the Commission has used its resources to come to a final order may actually discourage pre-order negotiations, allowing parties to take a "wait and see" approach. The public interest is generally served by favoring "resolution of disputes by negotiation and settlement rather than by litigation" *before* the Commission issues a Final Order. Again, whether the public interest is best served by eliminating a Commission Findings and Ordering Paragraph *after* the Commission issues a Final Order is, in the Staff's view, a more difficult determination than approving a pre-order settlement. As noted above, litigants may be less inclined to settle *before* the Commission issues a Final Order if the litigants know that they may be able to wait and see the Commission's final resolution of disputes and can then still avail themselves of the

> opportunity of entering into a post-Final Order settlement that *would also* eliminate the Commission's final resolution of issues.
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> Staff Response to Joint Motion to Re-Open The Record, at 5 (internal citation omitted).

Staff's above-quoted comments from its prior response are still applicable today. The public interest, moreover, as noted above in paragraph 5, could benefit by a specific finding of anti-competitive behavior.

8. In the event the Commission desires to support a post-order settlement in this proceeding, Staff raises concerns regarding the language set forth in the last paragraph of Section C of the (Revised) Amendatory Order (the Commission Analysis section). Staff recommends that this paragraph be deleted in its entirety or replaced with the following language:

> In their Joint Motion, however, TDS and SBC advise the Commission that they settled this issue on a voluntary basis after the issuance of the Commission's original Order dated September 9, 2004 ~~and TDS is withdrawing its request for~~ . SBC shall pay TDS' attorneys' fees and costs in accordance with that settlement. This Amendatory Order acknowledges the settlement of the parties and, pursuant to the settlement, the Commission deletes from its original Order both the findings and award that spurred the settlement. The parties point out that the Commission retained jurisdiction over disputes regarding ~~the~~ attorney's fees ~~issue~~ in its original Order. ~~Since the need for findings relative to Section 13-514 and SBC Illinois' prior termination liability policies was related solely to the attorney's fees issue, it is no longer necessary to reach any conclusion on this issue~~. Therefore, the Commission ~~will~~ issues this amendatory order that reflects the settlement of TDS' ~~request for reimbursement of its~~ legal and other costs.

The language proposed by the parties, if not amended as Staff suggests above, confuses the timeline of the original Order, adding language that relies upon a fictional withdrawal of a request for attorney's fees. The proposed language references a settlement but also states as a fact an event that did not happen, namely that TDS

withdrew its request for attorney's fees. The language also is circular when it discusses the need for findings under Section 13-514, apparently indicating that the findings were solely for the purpose of awarding attorney's fees rather than in fulfillment of the statutory purpose. The concept of a settlement of TDS' attorney's fees and a withdrawal of its request for the same is confusing and intrinsically contradictory.

In addition, the proposed language may be inconsistent with Sections 13-514 and 13-516 of the PUA. Section 13-516 (a)(3) requires the Commission to "award damages, attorney's fees and costs to any telecommunications carrier that was subjected to a violation of Section 13-514." Arguably, as long as a complaint under 13-514 is before this Commission, the Commission must act in accordance with 13-516 and TDS may have no right to withdraw the request for attorney's fees, in part, because that withdrawal would have the effect of infringing upon the Commission's authority. In other words, a party may not be able under this specific statutory provision to unilaterally limit the Commission's right to impose damages and fees. Deletion of the Joint Movants' proposed language avoids this issue and adoption of Staff's proposed language set forth above more clearly reflects the reality of a Commission acceptance of the parties' proposed settlement.

9. In sum, Staff acknowledges that the (Revised) Amendatory Order is more favorable to Staff than its prior Amendatory Order except as noted in paragraph 8 above. Staff also acknowledges that the Commission would appear to have broader discretion to amend its Final Order under Section 10-113 of the PUA than it had in re-opening this procedure under Section 200.900 of the Commission Rules. Nonetheless, Staff remains concerned that eliminating the first sentence finding anti-competitive

conduct in the Commission's Findings and Orderings Paragraph number 9, based upon a conditional post-Final Order settlement could, as a practical matter, set a troublesome precedent notwithstanding the parties' attempt to add language to the Order that identifies the underlying termination liability policy as anticompetitive.

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that the Commission consider the concerns that the Staff has provided in this Response to the Joint Motion when making its decision.

Respectfully submitted,

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